***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-1117**

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

ROBIN YANISHEFSKY,

*Defendant-Appellant.*

# BRIEF FOR THE UNITED STATES OF AMERICA

## Preliminary Statement

Robin Yanishefsky appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 4, 1973 after a two-day trial before the Honorable Inzer B. Wyatt, United States District Judge, sitting without a jury.

Indictment 73 Cr. 1029, filed on November 9, 1973, charged Yanishefsky in two counts with possessing heroin hydrochloride and cocaine hydrochloride with intent to distribute, in violation of Title 21, United States Code, Sections 812 and 841, and with introducing and attempting to introduce heroin hydrochloride and cocaine hydrochloride into Federal Detention Headquarters at West Street in violation of Title 18, United States Code, Section 1791. Indictment S 73 Cr. 1073, which superseded the prior Indictment, was filed on November 23, 1973. The superseding

indictment was virtually identical to the prior indictment, except that it contained the words "heroin" and "cocaine", instead of "heroin hydrochloride" and "cocaine hydrochloride".

On November 2, 1973, The Legal Aid Society was assigned, and Yanishefsky was remanded in lieu of posting $25,000 cash or surety bond. Yanishefsky remained in custody until November 12, 1973. At that time, bail was reduced to a $5,000 personal recognizance bond, co-signed by Yanishefsky's parents. Edward Leavy, Esq. was assigned on November 13, 1973. At the time of his assignment, The Legal Aid Society agreed to consult with Leavy on the case (Tr. of November 16, 1973, p. 2).*

Trial began on December 3, 1973. On December 4, 1973, Yanishefsky was found guilty on both counts by Judge Wyatt.

On January 18, 1974, Judge Wyatt suspended the imposition of sentence and placed Yanishefsky on probation for two years.

## Statement of Facts

### The Government's Case.

The Government proved at trial that Yanishefsky visited Federal Detention Headquarters at West Street in the afternoon of October 31, 1973 in order to see Roosevelt Bell, an inmate incarcerated for violations of the Mann Act (GX 7,

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* In fact, during trial a representative of the Legal Aid Society was in Court sitting at defense counsel table. Moreover, the affidavit of Michael Young, Esq. (The Legal Aid attorney on appeal), sworn to March 27, 1974, points out that "before and during the trial Mr. Leavy repeatedly conferred with Ms. Hermann, Ms. Elizabeth Westcott, a law clerk associated with the Legal Aid Society, and several other attorneys associated with the Legal Aid Society concerning his conduct of the defense."

12; Tr. 39, 134, 137, 162).* In accordance with the standard procedure, Yanishefsky filled out and signed a request for visit form (GX 12; Tr. 109, 163). Although not married to Bell, Yanishefsky listed herself as Bell's wife on the standard form (GX 12; Tr. 162).

Yanishefsky's visit with Bell took place in the visitors' and inmates' areas of West Street. (See lower middle of Government's Exhibit 16, a blackboard sketch showing the relevant areas of West Street).** During the afternoon of October 31, Bell had been observed peeking into the bulletin board room, an area where unaccompanied prisoners were not permitted (Tr. 27, 30). Although not allowed in the bulletin board room, unguarded prisoners apparently can get into this area (Tr. 27).

Correction Officer Michael Garone and prisoner Arthur Gantt both saw Yanishefsky, as she was leaving the sallyport area through Gate #1, toss a package of Kool Cigarettes through a hole in the plexiglass in Gate #2, into the bulletin board room (GX 8A, 16). At the time Yanishefsky was leaving West Street in the company of a black female and a black child who may have been only one-and-one-half years old (Tr. 14, 27-28, 134). The package of Kool contained five cigarettes, five glassine envelopes filled with heroin and four tinfoil packets filled with cocaine.

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* Page references preceded by "Tr." refer to the transcript of the trial; "GX" refers to Government Exhibits at trial.

** A visitor, in order to reach the visitor's area, must enter through Gate #1 and go through the sallyport, passing Gate #2, which is the entrance to the bulletin board room. Upon leaving the visitor's area on October 31, 1973, Yanishefsky went through the sallyport, tossed the package of Kool and the narcotics contained therein into the bulletin board room through a hole in the plexiglass in Gate #2, and went into the lobby through Gate #1.

Although Officer Garone, later joined by Lieutenant James Baucum, followed Yanishefsky out the front door, Yanishefsky effected her escape in a taxicab which she occupied with her two companions (Tr. 162). She was arrested on November 2, 1973. Following her arrest and after having received *Miranda* warnings, she admitted to FBI Agents Brotman and Corliss that she signed a visitor's form in the afternoon of October 31. 1973 to see Roosevelt Bell and that she had lied on the form by indicating that she was Bell's wife.

During the interview, she asked for a fresh package of Kool Cigarettes (Tr. 162).* Prior to the interview, a search of Yanishefsky's handbag at the FBI office revealed a package of Kool Cigarettes.

Thereafter, Yanishefsky was interviewed in the United States Attorney's Office. She was advised of her rights and thereafter she admitted that she had visited Bell at West Street on October 31 and that she had falsely listed herself as Bell's wife on the visitor's form. She further admitted that she had been carrying cigarettes during her visit, most probably Kool (Tr. 166).

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* As Kool Cigarettes were not available, other cigarettes were furnished (Tr. 162).

# ARGUMENT

## Yanishefsky was not deprived of the effective assistance of counsel.

Yanishefsky claims that she was denied her right to the effective assistance of counsel under the Fifth and Sixth Amendments. However, as has been repeatedly recognized, "there are stringent standards to be met to show inadequacy of counsel." *United States* v. *Maxey,* Dkt. No. 73-1770 (2d Cir. May 28, 1974), slip. op. at 3744. The ultimate question is whether the representation of Yanishefsky by Leavy was so poor as to have made the trial a "farce or mockery of justice" or was "shocking to the conscience of the Court." See *United States* v. *Sanchez,* 483 F.2d 1052, 1055-1059 (2d Cir. 1973); *United States ex rel. Walker* v. *Henderson,* 492 F.2d 1311 (2d Cir. 1974); *United States ex rel. Curtis* v. *Zelker,* 466 F.2d 1092, 1101 (2d Cir. 1972), *cert. denied,* 410 U.S. 945 (1973); *United States ex rel. Marcelin* v. *Mancusi,* 462 F.2d 33 (2d Cir. 1972), *cert. denied,* 410 U.S. 917 (1973); *United States ex rel. Crispin* v. *Mancusi,* 448 F.2d 233 (2d Cir.), *cert. denied,* 404 U.S. 967 (1971); *United States ex rel. Scott* v. *Mancusi,* 429 F.2d 104, 109 (2d Cir. 1970), *cert. denied,* 402 U.S. 909 (1971). In the present case, no such prejudice has been demonstrated.

Yanishefsky's shotgun allegations of incompetence are large in number. She contends, for example, that defense counsel failed to request a suppression hearing to challenge the statement given at FBI offices to FBI Agents Brotman and Corliss (Yanishefsky Br. pp. 15-16, 31, 36-37 45-46). Her brief (at p. 15) claims that, prior to the making of her statement, her request for a lawyer was refused by the FBI agents and that she told her trial counsel this. Her claim that she was denied counsel by the agents is contradicted by the sworn testimony at trial of one of the agents (Tr. 161-162). It has no basis in the record, and

it is apparently solely raised by her own statements made to her lawyers. That basis is insufficient for consideration either by this Court or by a District Court.*

Yanishefsky attacks the failure of Leavy to put on Lucy Wilson as a defense witness (Yanishefsky Ex. A on appeal; Yanishefsky Br. 22, 40). Government's Exhibit 7 reflects the fact that Lucy Wilson also visited West Street on October 31, 1973 to see Bell. Miss Wilson, who at the time resided at the same address as Yanishefsky, listed herself as Bell's sister. And in response to the Court's question, Yanishefsky stated that Miss Wilson was Bell's sister. In rejecting Yanishefsky's identical contention below, Judge Wyatt found that "Miss Wilson would be an interested witness and her testimony, weighed against the testimony of disinterested witnesses . . . would in my judgment not have affected the result" (Tr. of January 18, 1974, p. 196).**

In *United States* v. *Sanchez,* 483 F.2d 1052, 1058 (2d Cir. 1973), the Court rejected a similar contention of counsel's inadequacy based upon the failure to call "necessary witnesses." In throwing out this contention, this Court pointed out, in words having apt significance in the case at bar, that:

> "It is unclear precisely what the value of her testimony would have been."
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> * * * * *
>
> "What the record does reflect, however is that at no time did defense counsel demonstrate the relevancy

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* It should also be noted that Yanishefsky made a substantially similar statement to the United States Attorney's Office, after having been advised of her *Miranda* rights (Tr. 166-167). Yanishefsky never refers to this statement in her brief, and it apparently goes unchallenged.

** It is appropriate to note that neither in this Court nor in the District Court has an affidavit of Lucy Wilson ever been submitted as to what her proposed testimony would be.

> or materiality of Perez's potential testimony. We thus question appellant's description of the testimony that might have been offered by either Maria Giocochoea or Altimo Perez as being 'essential to the defense'; more importantly, however, we fail to see any prejudice to appellant from the non-appearance of either of those persons."

Since the District Court has already passed upon the lack of value and effect of Miss Wilson's proposed testimony and found it wanting, this Court should reach a similar conclusion, particularly because of the vague and undefined nature in which the matter is raised. Cf. *United States* v. *Trudo,* 449 F.2d 649, 653-654 (2d Cir. 1971), *cert. denied,* 405 U.S. 926 (1972); *United States* v. *Maddox,* 444 F.2d 148, 152 (2d Cir. 1971); *United States* v. *Puco,* 338 F.2d 1252 (S.D.N.Y.), *aff'd.* 461 F.2d 846 (2d Cir.), *cert. denied,* 409 U.S. 882 (1972). It seems more than likely that defense counsel representing the "wife" of a Mann Act violator showed sagacity, rather than ineffectiveness, in declining to call the "sister" of the Mann Act violator as a defense witness at a bench trial.

Still another bone that Yanishfsky picks with Leavy arises out of the absence of a *Simmons* hearing with respect to the identification testimony by Garone and Gantt. Each of those eyewitnesses had been shown a spread of six photographs of different white women prior to their testifying in Court. Leavy had examined these pictures prior to trial as part of the informal discovery that had occurred and introduced them as part of his cross-examination of the eyewitnesses (Tr. 88-91). Garone, a trained correction officer, selected photograph A-6 (defendant's photograph) from the six shown to him (Tr. 89). Leavy endeavored to impeach Garone's testimony by referring to names on two of the six pictures (Tr. 89), as well as by pointing out that there were names on the back of the photographs. How-

ever, Garone testified he had not seen any of the names on any of the pictures (Tr. 93).

Yanishefsky claims that the spread was impermissibly suggestive and that Leavy should have moved to strike *all* of the eyewitness testimony. The test for the admissibility of Garone's and Gantt's in-court identification depends upon whether the photographs shown to Garone and Gantt were so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *United States* v. *Evans*, 484 F.2d 1178 (2d Cir. 1973). The inquiry under *Simmons* is two-pronged: whether the initial identification procedure was impermissibly suggestive, and, if so, whether the procedure had such a tendency "to give rise to a very substantial likelihood of irreparable misrepresentation that allowing the in-court identification would be a denial of due process of law"; resolution of the latter issue "depends on the totality of the circumstances." *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-915 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). See also *Neil* v. *Biggers*, 409 U.S. 188, 200 (1972).* The Government submits that the

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* Yanishefsky's reading (Brief at 35-36) of *Saltys* v. *Adams*, 465 F.2d 1023 (2d Cir. 1972) is plainly incorrect. In *Saltys*, the Court reversed a denial of a habeas corpus petition, where trial counsel had failed to object to identification testimony based upon a "walk-through" in a bull-pen composed of thirty men, only three of whom, including petitioner, were white, where petitioner had not been notified of the procedure or afforded any right to counsel. The "walk-through" immediately followed a photographic display. Under such cases is *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), petitioner at the time had a virtually impregnable argument based on the absence of counsel at the identification. By way of contrast, the *Saltys* Court pointed out that no right to counsel exists at pre-indictment or post-indictment *photographic* displays. 465 F.2d at 1026; *United*

[Footnote continued on following page]

spread of photographs was proper, particularly since five of the photographs are of white women with dirty-blond hair. Indeed the fact that, by reason of hesitating between photographs A-1 and A-6, Gantt was unable to effect a positive photographic identification "is in itself evidence that the spreads were fair, for if identification is risky, some doubt is customarily to be expected." *United States* v. *Evans, supra,* 484 F.2d at 1185.

Nonetheless, even assuming *arguendo* that the spread of photographs shown was suggestive, it is plain that it was not the source of Garone's and Gantt's in-court identification. *United States ex rel. Gonzalez* v. *Zelker,* 477 F.2d 797 (2d Cir. 1973); *United States ex rel. Frasier* v. *Henderson,* 464 F.2d 260, 264-265 (2d Cir. 1972); *United States ex rel. Beyer* v. *Mancusi,* 436 F.2d 755 (2d Cir.), *cert. denied,* 403 U.S. 933 (1971). Garone and Gantt were less than ten feet from Yanishefsky as she placed the package of Kool's through the hole in the plexiglass in Gate #2. Yanishefsky followed her two companions through a door of Gate #1 which at the time was locked (Tr. 143-144). Garone, a trained officer, proceeded to follow Yanishefsky into the street where he saw her get into a taxicab. Government's Exhibit 8A indicates that the area was well-lit.

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*States* v. *Ash,* 413 U.S. 300 (1973). Recently, this Court has reaffirmed that even where the photographic procedures may have been unnecessarily suggestive, in-court identification testimony is admissible where the procedures used were not such as to constitute "a substantial likelihood of misidentification," *United States* v. *Evans,* 484 F.2d 1178, 1187 (2d Cir. 1973). Moreover, it should be noted that, unlike *Saltys* and *Evans,* the instant case involved a non-jury trial where the experienced trial judge was well aware of the entire range of issues involving eye-witness identification. Finally, unlike *Saltys,* where identification testimony was all that was available to link defendant to the crime, here there were highly important admissions, records maintained at West Street linking Yanishefsky to Bell and confirming her visit on the dates in issue, coupled with the latter's suspicious behavior, and corroborative testimony from Lieutenant Baucum.

Garone had not only the opportunity to observe Yanishefsky in-doors, but followed her outside in the daylight hours of an autumn day. *Neil* v. *Biggers, supra; United States ex rel. Gonzalez* v. *Zelker,* 477 F.2d 797, 801 (2d Cir. 1973); *United States ex rel. Smiley* v. *LaVallee,* 473 F.2d 682 (2d Cir. 1973); *United States* v. *Counts,* 471 F.2d 422, 424-425 (2d Cir.), *cert. denied,* 411 U.S. 939 (1973); *United States ex rel. Robinson* v. *Zelker,* 468 F.2d 159, 163-165 (2d Cir. 1972), *cert. denied,* 411 U.S. 939 (1973); *United States ex rel. Bisordi* v. *LaVallee,* 461 F.2d 1020, 1024 (2d Cir. 1972).

In sum, even had defense counsel requested a separate hearing in this non-jury trial, it is inconceivable that under the tests recently reiterated in *United States* v. *Evans,* 484 F.2d 1178 (2d Cir. 1973), that the identification testimony would have been excluded. And it must be noted that Leavy's cross-examination of Garone and Gantt dealt with numerous issues concerning photographic identification, i.e., names on the back, the barely visible names on the front of two of the pictures, Gantt's inability to select a single photograph, etc.* In sum, Leavy's presentation on the question of photographic identification in this non-jury trial covered virtually the entire panoply of issues in this area.

The remainder of Yanishefsky's contentions on Leavy's alleged lack of competency are frivolous.

Yanishefsky claims that Leavy failed to inspect the West Street facility where the incident took place. Indeed, Yanishefsky goes so far as to claim that the officials at West Street insisted upon a court order before any information would be forthcoming (Brief at 39). In the first place Leavy's knowledge of West Street was sufficiently precise

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* Moreover, Leavy arranged to have Ms. Elizabeth Westcott of The Legal Aid Society, a young lady approximately defendant's age with blond hair, at the defense table when the identification testimony occurred.

that he was able to furnish a diagram of the facilities where the events took place (Tr. 9). Moreover, Leavy's opening statement reflected a detailed knowledge of the structure and workings of the West Street facility (Tr. 9-12). Leavy's presentation also made clear that he was able to confer with guards at West Street in connection with these matters (Tr. 12). In any event, we are not aware of anything in Rule 16 or any other discovery rule that affords a defendant any such discovery rights to the inner workings of a federal prison.

Yanishefsky also claims that she was somehow prejudiced by counsel's failure to obtain in advance of trial a list of all visitors to West Street on October 31, 1973 (the date of the incident) until the first day of trial. This is sheer nonsense. There were approximately 100 visitors to West Street on that day. The names and addresses of these visitors were furnished to Mr. Leavy on December 3, 1973, the first day of trial (Tr. 114). However, the testimony of Officer Garone and the prisoner Gantt confirmed that there were only three visitors in the sallyport area (the area from which visitors leave to go into the lobby and out the front door) at the time of the incident (Tr. 27, 28, 134; see Tr. 117). One of these visitors was identified as Yanishefsky; the other two were a black woman and a black child who preceded defendant into the lobby. Consequently, these two individuals could not and presumably did not observe Yanishefsky tossing the Kool package in the opposite direction. In any event, the black woman and black child got into the same taxicab with Yanishefsky (Tr. 14, 181). The black woman appears to have been Lucy Wilson (Tr. 14, 114; Yanishefsky Ex. C on appeal). Under these circumstances to require Leavy or indeed any other counsel to go out and interview the other 97 visitors to West Street on October 31, 1973 is to insist upon a useless exercise. Certainly, Yanishefsky knew the two people she visited with on October 31, 1973. And Yanishefsky—whose brief is filled with a raft of contentions outside the record—never even attempts to argue that Leavy did not confer with Miss Wilson.

Indeed, Yanishefsky indicates that Leavy was indeed aware of Miss Wilson (Br. 40).

Once the absurdity of Yanishefsky's claims on the witness lists and visitation rights to West Street are made clear, Yanishefsky's complaints (Brief at 3-4) as to the informal discovery procedures utilized here and in numerous other cases as well fall by the wayside.

Leavy is also attacked because of his willingness to concede in his opening that Yanishefsky was at West Street on October 31, 1973 (Brief at 6).* The evidence as to Yanishefsky's visit to West Street on October 31, 1973 could not have been stronger. Two records of West Street (GX 7 and 12), the testimony of Garone and Gantt, and Yanishefsky's own admissions, all put Yanishefsky at West Street on October 31, 1973.

Another supposed proof of Leavy's incompetency is his willingness to stipulate that the warden of West Street, Louis Gengler, had no prior knowledge that Yanishefsky would be introducing or attempting to introduce heroin or cocaine into West Street (Tr. 175). Surely, this was a very narrow stipulation, and the Government was prepared to put on Warden Gengler, who would have testified to precisely the same effect (Tr. 174-175). It is absurd to suppose that Gengler would have authorized the illegal distribution of narcotics to a prisoner at West Street.

In sum, Yanishefsky's claims as to Leavy's failure to furnish adequate representation are baseless. As the District Court recognized, Garone's and Gantt's testimony was corroborated by Yanishefsky's admissions to the FBI agents and to the United States Attorney's Office, by the fact that a Kool package was found in her pocketbook at

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* As has been recognized, a Court sitting without a jury will not be presumed to give weight to matters that do not constitute admissible evidence. See *United States* v. *Knight*, 395 F.2d 971, 974 (2d Cir. 1968).

the time of arrest, by various Government Exhibits especially Government Exhibits 7 and 12, and by the testimony of Lieutenant Baucum.*

Under the circumstances there is no doubt whatsoever that the Yanishefsky's claims do not even rise to the dignity of suggesting that the trial was a "farce" or "shocking to the conscience of the Court." Apparently well aware of all this, Yanishefsky asks the Court to reject the well settled "farce" and "mockery" standard, in favor of a more liberal test based on whether "counsel [is] reasonably likely to render and rendering effective assistance" (Brief at 24). For this proposition, he cites, among other cases, *Bruce* v. *United States,* 379 F.2d 113 (D.C. Cir. 1967). This Court recently has referred to *Bruce* as establishing the most "liberal" standard presently being applied, to wit, "to obtain relief a petitioner must show that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a *substantial defense* . . ." *United States ex rel. Testamark* v. *Vincent,* Dkt. No. 73-2614 (2d Cir., May 8, 1974), slip op. at 3358 (Emphasis in original). In *Testamark,* the Court reversed a District Court grant of a petitioner's habeas corpus application. *Testamark* by no means suggests or in any way indicates that this Court has adapted the *Bruce* standard.** *Testamark* properly read

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* Indeed, the point the District Court raised as to lack of Yanishefsky's motive which arises because officer Garone was able to retrieve the packages of Kool's and its narcotic contents—has been answered in the record by Garone (Tr. 52-53) and by Government's Exhibit 8A. They indicate that Yanishefsky probably did not see Garone as she was speeding out of the visitor's area into the sallyport where she tossed the Kool package through a hole into the bulletin board room. (See GX 8A and 16).

** Yanishefsky also cites several other cases, such as *White* v. *Ragan,* 324 U.S. 760, 762-763 (1945); *Beasley* v. *United States,* 491 F.2d 687 (6th Cir. 1974); and *Moore* v. *United States,* 432 F.2d 730 (3d Cir. 1970), for what he urges is a view more liberal than the *Bruce* standard. On analysis, each of the cited cases involved defense counsel who was not only grossly incompetent, whose incompetence prejudiced defendant by blotting out one or more substantial defenses, or who in *White* v. *Ragen,* forced the defendant to plead guilty contrary to his own wishes.

goes no further than to state that under that fact situation, petitioner's writ must be denied since he failed even under the most "liberal" standard now applied in the District of Columbia Circuit. In sum, the test is far more stringent than Yanishefsky urges.

On the record before this Court there is nothing to suggest gross incompetence on the part of Mr. Leavy. There is nothing to indicate that any supposed gross incompetence has blotted out the essence of a substantial defense. In fact, when all is said and done Mr. Leavy, as the District Court found (Tr. 195), performed admirably for a client faced with a strong Government case involving serious charges involving the importation of heroin and cocaine into a Federal prison which has seen riots in the recent past.

It is apparent that the Court's reasoning in giving Yanishefsky a rather lenient suspended sentence relied heavily on Leavy's sentence memorandum which referred to Yanishefsky's family, the assistance of the probation office, Yanishefsky's motivation to better her lot and other factors (Tr. 203-204). In short, Leavy's representation furnished Yanishefsky with highly effective representation.*

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* Yanishefsky's reference to *De Marco* v. *United States*, 42 U.S.L.W. 3520 (Sup. Ct. March 18, 1974) in support of a remand is misplaced. In *De Marco*, a witness had testified at petitioner's trial that no promises had been made to the witness in connection with the witness's case. A court transcript demonstrated, however, that a plea bargain had been made with the witness. Under well-settled law, this in and of itself required reversal, unless the Court found that the promise did not occur prior to the time of testimony. A remand was ordered to ascertain when the plea bargain had occurred. No situation even remotely analogous is presented by the case at bar.

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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